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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	GC Docket No. 95-172
	)	
RAINBOW BROADCASTING COMPANY	)	File Nos. BMPCT-910625KP
	)	BMPCT-910125KE
For Extension of Time	)	BTCCT-911129KT
to Construct	)	
	)	
and	)	
	)	
For Assignment of	)	
Construction Permit for	)	
Station WRBW(TV)	)	
Orlando, Florida	)	

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To: The Honorable Joseph Chachkin
Administrative Law Judge

RAINBOW OPPOSITION TO PRESS STATEMENT FOR THE RECORD

In a pleading filed after the close of the record and adhering to no recognized procedural norm, Press Broadcasting Company, Inc. (Press) charges Rainbow with potentially disqualifying character flaws because of several alleged imperfections in its discovery efforts. Because none of the matters alleged involved error, impropriety or recalcitrance by Rainbow, prejudiced any party or affected the conduct of the proceeding, Rainbow Broadcasting Limited and Rainbow Broadcasting Company urge dismissal of Press' untimely, unwarranted and inappropriate pleading.

The record in this proceeding was closed on July 5, 1996. On July 12, 1996, Press filed a pleading entitled

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List A B C D E

"Statement of Press Broadcasting Company, Inc. for the Record, Invitation for Response from Rainbow Broadcasting Company and Rainbow Broadcasting, Limited, or, in the Alternative, Petition to Enlarge Issues" (Statement), the essential purpose of which was to elicit written answers from Rainbow to various newly propounded questions concerning specified conduct of Rainbow principals and counsel in connection with discovery. Under Press' theory, the A.L.J. should either make Rainbow's responses part of the hearing record bearing on Rainbow's basic qualifications or hold another hearing. In July 17, 1996 Comments, the Commission's Separate Trial Staff endorsed this unprecedented procedure.

Press challenges the manner of Rainbow's compliance with discovery requests in that 1) Leticia Jaramillo was not asked whether she had any of the documents sought; 2) several documents were not found and exchanged until two weeks before hearing; and 3) further documents thereafter requested by the Special Staff were not found or, in one case, were discovered by accident during the hearing. Press also contends that in record discussions concerning the scope of discovery, counsel for Rainbow Broadcasting Limited may have understated the extent of her involvement in the Florida litigation between Rainbow and the

Gannett Tower Company. These two categories of challenged conduct raise different questions and will be separately discussed.

Before discussing any of the specific allegations, however, there is a fatal threshold defect in Press' request for relief: The effort to reargue alleged deficiencies in Rainbow s discovery fails the Commission's standards for untimely petitions to enlarge and for reopening of the record, ***47 C.F.R. § 1.229(c); Great Lakes Broadcasting, Inc***., 8 F.C.C. Rcd. 4331, 4332, 69 R.R.2d 946, 948 (1981), in that Press has failed to demonstrate that any of the matters raised is of probable decisional significance or to establish the likelihood that potentially disqualifying allegations would be proven. *See also*, ***Texas Communications Limited Partnership***, 7 F.C.C. Rcd. 3186, 3188, 70 R.R.2d 1487,1490 (1992). Nor could these standards which must be "strictly construed," as the Commission noted in ***Great Lakes***, *supra*, have been met since none of the matters raised had the slightest bearing on trial of the issues.

Rainbow's Compliance with Discovery Requests

1) Leticia Jaramillo. Press concededly learned at Leticia Jaramillo's May 16, 1996 deposition both that she had not been asked for documents and that she had no

documents because she maintained no files. Statement, page 2 & footnote 2. Since Ms. Jaramillo had no files, Press concluded that, the failure to ask her to search them "was of limited actual impact or importance, and Press declined to pursue the matter." *Ibid.*, at footnote 2. Thus Press neither sought to compel further discovery nor asked Joseph Rey, either in deposition or at hearing, whether he had asked Ms. Jaramillo for help in finding documents and if not, why not.

Now that the record is closed, however, Press seeks not simply to be relieved of its own informed judgment that the matter was too trivial to pursue, but in fact to suggest that Rainbow's failure to ask Jaramillo for documents she has testified under oath and without contradiction that she did not possess so taints its discovery efforts as to bear on its character qualifications. Thus, without citation of any authority, Press posits both the existence and the potentially disqualifying breach of an affirmative legal duty on Rainbow's part to ask Leticia Jaramillo for documents.

Press' asserted duty is fanciful in general and pointless on the facts since no injury, prejudice or inconvenience to anyone is even suggested to have resulted from Rainbow's failure to ask Ms. Jaramillo for documents

she did not have. In any event, if Press genuinely believed there was a cognizable breach of some recognized duty by Rainbow, that breach became known on May 16 and Press had 15 days to make its case under Rule 1.229(c).

2) The Documents Produced at Exhibit Exchange

The details of Rainbow's discovery and exchange of the Exhibit 7 documents is already exhaustively documented and discussed on the record. On June 11, 1996, Rainbow provided the parties with a number of letters written between August and December 1991, noting that "[d]uring preparation of the . . . direct case, several documents were uncovered in Orlando, Florida that were not produced during document production and which should have been." Statement, Attachment B. In a June 12, 1996 letter, Separate Trial Staff counsel requested any "incoming" or "related correspondence," reciting that the request was "without prejudice to any objections we might raise at the hearing to the introduction of any of these documents into evidence." *Ibid.*, Attachment C.

By letter of June 18, 1996 (*ibid.*, Attachment D), Rainbow reported the failure of "a further [search] effort specifically responsive to your request," and because "[t]he tone of your letter suggests that RBC may have some hidden reason for offering [the Exhibit 7]

documents at a late date," provided a more detailed explanation of the discovery:

> The WRBW-TV offices have been moved at least twice during the past several years, and we have made every effort to uncover relevant documents, sometimes under difficult circumstances where past files were frequently located through luck. Many of the documents were found in packed boxes that had survived the office moves, the contents of which had not been placed into any discrete file.
>
> The documents produced to you on June 11 were located in a box that had escaped review during the earlier stages of discovery.

Separate Trial Staff counsel raised the matter again at hearing, demanding "a statement on the record by Rainbow Broadcasting Company's counsel as to what steps were taken to discover this evidence, when it was discovered, and how it came about that it was not produced during the discovery process. I think the record should show that before we proceed." Tr. 361. The A.L.J. then called upon Mr. Eisen, who made such a statement, again explaining how the June 11 documents had been found and repeating his assurance that no further documents could be found despite repeated search. Tr. 361-362. He noted that his explanation was based upon "[w]hat I can tell you that I know " Tr. 361-362, and suggested that since the search and discovery had been made by Joseph Rey, "you may wish to adduce some of that through an appropriate witness," Tr. 361.

Counsel further stated that, "I don't think there is any prejudice that could possibly accrue to any of the parties by allowing any of that evidence . . . . The witness is here and will testify that he found those documents and he was directly implicated in those documents, and created the documents for the most part." Tr. 362. He again assured the parties and the tribunal that Rainbow Exhibit 7 is "the sum total of what we were able to find with regard to those documents. And that's my statement. Hopefully you are satisfied." Tr. 362. At the conclusion of Mr. Eisen's statement, the A.L.J. also advised Mr. Silberman that "[y]ou can further explore it with Mr. Rey if you want since apparently he is the one who found the material." Tr. 362-362.

Notwithstanding these repeated invitations from Rainbow and the A.L.J., neither the Separate Trial Staff nor Press either sought voir dire or objected to admission of Rainbow Exhibit 7. Tr. 646-647, 737. Nor did they raise the matter with Mr. Rey.[1/] Accordingly, there can be no basis, either under the existing issues or by enlargement, for further exploration of the matter.

1/ Nevertheless, to eliminate any question of the second hand nature of counsel's explanation, Rainbow also attaches hereto the sworn statement of Joseph Rey confirming the accuracy of Bruce Eisen's June 18, 1996 explanation to the Separate Trial Staff.

Press' real intent, however, does not seem to be eliciting more information on Rainbow's document search but redefining Rainbow's tardy discovery of the Exhibit 7 documents as an actionable character defect. This it may not do as a matter of law. The discovery rules are not a test of administrative efficiency under which parties are penalized for tardy compliance; they are a device for avoiding surprise and resulting prejudice, neither of which is here alleged. Their very structure contemplates late discovery of relevant material, "triggering [a] duty to disclose" when a "party 'learns that in some material respect the information is incomplete or incorrect.'" 8 C. Wright, A. Miller & R. Marcus, ***Federal Practice and Procedure*** § 2049.1 (1994). Here the documents were turned over as soon as they were found, which was well in advance of hearing, thus obviating prejudice or inconvenience to the parties or the tribunal.

Press cites no Commission precedent for premising potentially disqualifying character findings on late discovery of additional documents and Rainbow is aware of none.[2/] The uncontroverted fact that Joseph Rey found the

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2/ The record in this case is devoid of evidence that Rainbow concealed or failed to make a good faith effort to seek out the Exhibit 7 documents. Nor would such action have made any sense since the relevant letters supported an element of Rainbow's proof and ultimately became a Rainbow exhibit.

Exhibit 7 letters in a previously overlooked box could not support denial of Rainbow's application. The suggestion that immaterial discovery transgressions are comparable to immaterial misrepresentations under the ***WOKO*** doctrine is erroneous. Even in cases of the most serious and prolonged failure to provide judicially requested information, dismissal under Rule 73.3568(b) is justified only "when there has been a 'pattern of dilatory, disruptive or recalcitrant conduct so sharply out of order as to absolutely compel dismissal.'" ***Innovative Women's Media Association v. F.C.C.***, 16 F.3d 1287, 1289 (D.C. Cir. 1994) (quoting from ***The Dunlin Group***, 6 F.C.C. Rcd. 4642, 4644 (Rev. Bd. 1991)).

Where such a pattern exists, dismissal-- or in this case denial-- should be "a weapon of last, rather than first resort," ***Mead v. Grubbs***, 841 F.2d 1512, 1520 (10th Cir. 1988), and the "factors appropriate for consideration" would include "the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by the other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct." ***Comuni-Centre Broadcasting, Inc. v. F.C.C.***, 856 F.2d 1551, 1554 (D.C. Cir. 1988); *see* ***Ehrenhaus v.***

Reynolds, 965 F.2d 916, 920-921 (10th Cir. 1992). The fact that none of those factors is present here and there is no question of noncompliance with the relevant discovery request demonstrates the frivolous nature of Press' charge of wrongdoing.

Nor would the case be different if there had been some rule violation: There is no Commission precedent for sanctioning parties guilty of harmless discovery violations and even the automatic sanction procedures of Fed. R. Civ. P. 37(c)(1) specifically exempt harmless discovery offenses from punishment. Imposition of sanctions in such cases would have the perverse effect of penalizing the litigants at bar for their ultimate compliance and encouraging future litigants to conceal late found documents lest they too be sanctioned.

3) The Document Discovered at Hearing

Press' attachment of significance to the fact that one of the letters requested by the Separate Trial Staff and not found by Rainbow turned out to be attached to the amended complaint in the Florida tower litigation, which Rainbow offered as an exhibit during hearing, is incomprehensible since the document had already been located by Press and entered into evidence as Press Exhibit 6 at an earlier session. Thus even if Rainbow had discovered

that the letter was in its possession it would have been under no obligation to produce it since "supplementation or correction is not required if the added information has been made known to the other parties during the discovery process . . . ." ***Federal Practice and Procedure***, *supra*, at § 2049.1

Press' attempt to attach actionable significance to Rainbow's failure to exchange a document already in evidence is the obverse of its challenge to the failure to ask Leticia Jaramillo for files she did not keep. On the face of it, neither matter could possibly have an adverse effect on the parties or the proceeding and is therefore quintessentially harmless error at worst.

While Press has not directly urged denial of Rainbow's application on the basis of the three foregoing matters, it is the explicit purpose of its Statement to persuade the A.L.J. that these individually harmless imperfections in Rainbow's document exchange combine to create a kind of penumbral shadow on the applicant's basic character qualifications which may be found disqualifying either in the context of the existing issues or through enlargement. The potential end result would thus be Rainbow's disqualification on the basis of a series of matters none of which has any significance under

the existing issues and none of which could form the basis for an added issue. There is no warrant in law for such a result.

Rainbow Counsel's Role in the Florida Tower Litigation

Press' contention that Rainbow's broadcast qualifications could be adversely affected by counsel's alleged understatement of her role in the Florida litigation between Rainbow and the owner of its transmitter tower is illogical as a practical matter and inaccurate in law. The nature and extent of counsel's role in that lawsuit are wholly without relevance to any issue in this case and could not therefore affect Rainbow's qualification to be a Commission licensee. Counsel's representations are relevant-- if at all-- only as the basis for a charge of professional misconduct, a question tangential to and inappropriate for resolution in a licensing proceeding.

The "cardinal focus" of a Commission licensing proceeding "is upon the conduct (or misconduct) of the . . . applicants; the alleged conduct, or potential misconduct, of legal counsel is largely tangential to that functional focus, and a generally separate matter that can -- if indicated -- be examined before an appropriate tribunal in an independent disciplinary proceeding commenced exclusively for that purpose pursuant to § 1.24 of the

Commission's Rules." ***Opal Chadwell***, 2 F.C.C. Rcd. 1197, 1198, 62 R.R.2d 663, 665 (Rev. Bd. 1987).

The ***Chadwell*** conclusion was reached despite the fact that counsel's alleged misconduct was suborning perjury by a witness on an issue in the case. Similarly, in ***Broadcast Associates of Colorado***, 100 F.C.C.2d 616 (Rev. Bd. 1985), on which ***Chadwell*** relies, counsel's alleged misconduct was instructing an applicant to certify an application exhibit in blank. Here, in contrast, the alleged misconduct involves a matter which does not bear even tangentially on the applicant's qualifications.[3/] Its pursuit in the context of this proceeding is accordingly *a fortiori* an inappropriate and impermissible distraction prejudicial to Rainbow's right to have its qualifications determined on the issues.

CONCLUSION

For the reasons stated above, the Statement for the Record filed by Press Broadcasting Company on July 12, 1996 should be dismissed in all respects.

3/ Nor in fact does it reflect professional discredit on counsel because the participation of Rainbow's communications counsel in the Florida proceeding was, as stated on the record, ancillary and tangential. To the extent that Press advances the matter to establish that Rainbow's counsel does in fact have the case files in the *Rey v. Gannett* litigation, it is here reiterated that Rainbow's counsel does not and never has had those files.

Respectfully submitted,

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Counsel for Rainbow Broadcasting Company

25 July 1996

DECLARATION OF JOSEPH REY

I, Joseph Rey, under penalty of perjury, hereby declare as follows:

I have reviewed Bruce A. Eisen's June 18, 1996 letter to David Silberman regarding Rainbow Broadcasting Company's June 11, 1996, Production of Documents as well as its search for "incoming correspondance" to which those documents might have responded.

The facts contained in Mr. Eisen's letter are true and correct to the best of my knowledge and information.

Respectfully submitted,

Joseph Rey

Date: 7/23/96

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Rainbow Response to Press Statement for the Record were sent first class mail, postage prepaid, this twenty fifth day of July 1996, to the following:

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